



Billing Code 6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

Modifications to the Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs For Such Offenses.

AGENCY: Federal Deposit Insurance Corporation (FDIC)

ACTION: Final policy statement.

SUMMARY: On January 8, 2018, the FDIC published in the *Federal Register* notice of proposed changes to its statement of policy (SOP) concerning participation in banking of a person convicted of a crime of dishonesty or breach of trust or money laundering or who has entered a pretrial diversion or similar program in connection with the prosecution for such offense pursuant to Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829 and sought comments on the proposed changes. After the closing of the comment period, the FDIC reviewed the comments received and has made some changes and clarifications to the proposed statement. The FDIC is now publishing the SOP in its final form. After publication the statement of policy will also be available on the FDIC's website.

APPLICABLE DATE: July 19, 2018.

FOR FURTHER INFORMATION CONTACT: Brian Zeller, Review Examiner (319) 395-7394 ext. 4125, or Larisa Collado, Section Chief (202) 898 8509, in the Division of Risk Management Supervision, or Michael P. Condon, Counsel (202) 898-6536 or

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SUPPLEMENTARY INFORMATION:

I. Background.

Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829, (FDI Act) prohibits, without the prior written consent of the FDIC, a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party (IAP), owning or controlling, directly or indirectly an insured depository institution (insured institution), or otherwise participating, directly or indirectly, in the conduct of the affairs of the insured institution. In addition, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. Section 19 provides a criminal penalty for the knowing violation of its provisions of a fine of not more than \$1,000,000 for each day of the violation or imprisonment for not more than five years. The FDIC's current SOP was published in December 1998 (63 *Fed. Reg.* 66177) to provide the public with guidance relating to Section 19, and the application thereof.

II. Revisions to the Statement of Policy Based on Comments Received.

Following the close of the comment period the FDIC reviewed the comments received. All of the comments were, in general, supportive of the changes the FDIC had proposed but several of the comments suggested additional changes, modifications or clarifications of both existing provisions of the statement of policy and in response to the changes on which the FDIC had requested comment. Having reviewed the comments the

FDIC has accepted some of those comments, in whole or in part, as well as making some additional technical revisions to the SOP.

III. Review of Comments Received

The FDIC received seven comment letters or e-mails on its proposed revision of the SOP. The comments came from a number of different entities—one from an individual; one on behalf of an insured depository institution; two from different depository institution trade groups; two from different components of an umbrella advocacy group; and one from an organization that provides legal aid assistance. Of the seven commenters, three (from the individual and the two depository institution trade groups) were supportive of the proposed changes in the SOP and did not suggest any additional changes or modifications. While the remaining four commenters were, in general, supportive of the FDIC’s proposed changes, they suggested additional new changes, clarifications or modifications, which are discussed below.

Conditional Offers of Employment

Two comments addressed proposed changes to the SOP that would allow institutions to make conditional offers of employment prior to conducting a background check into the applicant’s prior arrests, convictions or entries into a pre-trial diversion or similar program (program entry). Both comments suggested that the FDIC actually instruct all FDIC-insured institutions to adopt the practice of making such conditional offers of employment. The FDIC declines to make this change for a number of reasons.

The FDIC’s statutory authority under Section 19 is focused upon the requirement that the FDIC provide prior written consent before an individual covered by the statute may participate in the affairs of an insured depository institution. It does not grant the

FDIC any rule-making authority to impose conditions or requirements on an insured depository institution other than to note that an institution may face a criminal penalty for acting in violation of the statute. The FDIC takes the position that insured depository institutions should be free to develop the policies and procedures best suited to them to ensure compliance with Section 19. In addition, the FDIC does not have direct supervisory authority over insured depository institutions that are subject to the supervisory authority of other Federal banking agencies (FBAs). Therefore, it is within the supervisory authority of the other FBAs to determine what is satisfactory to them in reviewing the policies and procedures their respective supervised institutions adopt to ensure compliance with Section 19. Insofar as the SOP constitutes policy guidance rather than an enforceable regulation, it is an inappropriate means for the FDIC to impose such a mandatory requirement even on its own supervised insured depository institutions.

Expungements

Three comments opined that the language proposed by the FDIC regarding expungements should be clarified or expanded. One suggested that the FDIC accept all expungements as complete expungements regardless of whether the records could be accessible for any other purpose. In considering the comments, the FDIC agrees that the proposed language in the SOP should be altered to clarify when an expungement is considered complete for Section 19 purposes, while providing the FDIC's rationale for allowing at least some expungements to remove a conviction or program entry from Section 19's coverage.

The FDIC has determined that expungements that reflect the complete destruction of the records and the jurisdiction's goal to completely remove the conviction or program

entry from a person's past, justified the interpretation that the intent was to, as a matter of law and fact, place the person in the position as if conviction or program entry had never happened. However, in cases where the FDIC has considered whether an expungement was complete it found that in the majority of cases either the records were still in existence or the expungement was limited and allowed the use of the conviction or program entry records in subsequent matters including, but not limited to, questions associated with character and fitness depending on the jurisdiction's public policies.

After reviewing the comments the FDIC agrees that the language in the proposed changes to the SOP should be altered to clarify and more carefully focus on the type of expungement that it believes should exclude a conviction or program entry from the bar in Section 19. First, as noted in the proposed notice and comment, the existence of records of convictions and program entries may be found in multiple places even if the originals are destroyed in a timely manner. Second, in considering the issue of whether the expungement is one that should be outside the scope of Section 19 the more fundamental question is whether the jurisdiction, by statute or court order, intended that the conviction or program entry be no longer in existence and, essentially, gone from the individual's history. Preservation in an expungement statute or in a court order of the ability to subsequently use the conviction or program entry for another purpose, consistent with the jurisdiction's public policy, means that the conviction or program entry has not been completely expunged. In such a circumstance, the FDIC will also review the conviction or program entry to determine if it should grant consent for the person to work in, or otherwise participate in the affairs of, an insured depository institution. The FDIC is amending the language in the SOP to read:

“If an order of expungement has been issued in regard to a conviction or program entry and is intended by the language in the order itself, or in the legislative provisions under which the order was issued, to be a complete expungement, then the jurisdiction, either in the order or the underlying legislative provisions, cannot allow the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person’s fitness or character. The failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of Section 19 in such a case.”

One comment suggested that successful completion of a pretrial diversion or similar program should be considered a complete expungement. The FDIC declines to make the suggested change for two reasons. First, the statutory language in Section 19 applies in the same manner to convictions and program entries. Second, consistent with the treatment of expungements discussed, in the context of a conviction, to the extent a program entry is still subject to subsequent use by the jurisdiction where it was entered, then the FDIC will treat it the same as a conviction. One comment also suggested that sealed records should be excluded from the coverage of Section 19. If the order sealing the records is one that would be the same as an order of complete expungement as set out in the SOP, then the FDIC will treat it in the same manner as a complete order of expungement.

Conviction of Record

Two comments focused on the proposed language in the SOP that states that convictions that are set aside or reversed after sentencing requirements have been completed remain convictions of record for purposes of Section 19. As noted by one of the comments, there are jurisdictions in which after an individual has completed all of the sentencing requirements, the court has set aside the conviction based upon the completion of sentencing alone. The FDIC is aware that such jurisdictions have used the foregoing

process to create what is essentially a “pretrial diversion or similar program.” In contrast, courts may set aside or reverse a conviction on appeal based upon a procedural or substantive error in the case. The vast majority of such cases will have a finding that addresses the error.

The FDIC believes that where a conviction has been set aside because of the completion of a sentence, such a procedure is, in essence, a pretrial diversion or similar program, covered by Section 19. On the other hand, in cases in which there has been a procedural or substantive error that results in the conviction being set aside, the FDIC will not consider such convictions as a conviction of record for Section 19 purposes. In order to clarify the different treatment, the FDIC has adjusted the language in the SOP to clearly recognize that convictions set aside or reversed on appeal that are based on a finding that there has been a procedural or substantive error should not be considered convictions for the purposes of Section 19.

Three of the comments focused on the state of New York’s adjournments in contemplation of dismissal (ACD) program (and in general seemingly to other similar programs), and recommended that the FDIC explicitly find that ACDs are not pretrial diversion or similar programs. As the comments recognize, however, one or more of the elements of rehabilitation addressed in the SOP as a factor for determining whether something is a pretrial diversion or similar program can apply to ACDs. Therefore, it is difficult to treat ACDs as anything other than a pretrial diversion or similar program. To the extent that the FDIC may have previously issued a letter determining that a particular individual who had an ACD was not covered by Section 19, the FDIC will not retroactively change its response in that case.

De Minimis Exception

Three of the comments focused on various aspects of the FDIC's *de minimis* exception to filing, as it currently exists, or as proposed, and sought additional clarifications or modifications. One comment criticized the definition of "jail time" in the proposed SOP, and suggested that the definition should remain the traditional definition of that term, *i.e.*, actual time in jail. The existing SOP does not include any definition of jail time; however, the FDIC, based on its experience, is aware that jurisdictions apply various approaches to confinement based upon the nature and circumstances of the crime. Therefore, the FDIC seeks to provide a definition of the term "jail time" that is consistent with its efforts to apply the *de minimis* exception to lesser crimes. In reviewing the comments, however, the FDIC determined that the definition, as proposed, may be too broad given the interpretations reflected in the comments, which suggest that such items as parole may appear to be included. Therefore, the FDIC has adjusted the language in the SOP to define "jail time" as "the confinement to a specific facility or building on a continuous basis . . ." The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location.

Another comment sought to change the unlimited time to which Section 19's coverage applies to criminal convictions or program entries to only those occurring within the prior 7 to 10 years. Because the statutory language contains no limits on the period of time to which its prohibitions apply, the FDIC does not have the authority to change that time. In fact, the FDIC notes that there is a ten-year restriction on its ability to grant consent for certain serious crimes that requires the FDIC to obtain the sentencing

court's permission prior to its granting consent to permit a covered individual to participate in the affairs of an insured depository institution. Further, while the passage of time is a factor in the FDIC's review of an application under Section 19, it is not, by itself, dispositive.

One comment proposed that the SOP should contain a short list of crimes that would never require an application or that would be included within a *de minimis* exception to filing once a limited period of time has passed. The FDIC believes that a sufficient period of time should pass after a crime has occurred to allow the FDIC to determine if the individual has engaged in similar behaviors, which would potentially put an insured financial institution at risk. The FDIC considers this to be an important element of the *de minimis* exception to filing and is not prepared to eliminate the time requirement.

One comment appears to suggest that all crimes committed by a person under the age of 21 should be covered by the *de minimis* exception to filing, provided that there is at least 30 months between the conviction and the potential employment. Again, the FDIC has determined that if there is a pattern of covered crimes before the age of 21, it should look at an individual's application to determine the degree of risk to any insured depository institutions as proposed in the SOP. However, one aspect of the comment addressed the use of false, fake or altered forms of identification. Although the FDIC is not prepared to extend *de minimis* as far as the comment suggested, the FDIC has decided that the use of a fake, false or altered form of identification by a person under the legal age to obtain or purchase alcohol, or to enter a premises where alcohol is served but for which an age appropriate identification is required, is an acceptable category for the use

of the *de minimis* exception to filing, provided that the person has no other conviction or program entry for a crime covered under Section 19.

Additionally, one comment suggested that the proposed *de minimis* exception to filing for crimes or program entries that occurred when the individual was 21 or younger be expanded to include cases in which the actions that led to the conviction or program entry occurred before age 21, but the conviction or program entry did not occur until after the age of 21. The FDIC has determined that this change is consistent with the reasons for this exception to the filing requirements and has included a specific exception to include such cases.

Two comments focused on the requirement that drug crimes that do not fit the *de minimis* exception to filing should not be covered by Section 19. The FDIC maintains that an application is required for it to determine the nature of the offense and elements of the crime, and therefore it will continue the current requirement that an application be filed. Alternatively, it was suggested that the FDIC create a specific category of *de minimis* exceptions to filing to cover minor drug offenses. The FDIC in its proposed changes has already noted that, if the drug crime fits the *de minimis* exception to filing, then no application is required, and no separate *de minimis* category for drug offenses is necessary.

One other issue of note is that, after careful review, the FDIC has recognized that all of the categories falling within the *de minimis* exceptions to filing should be consistent, and that no category should be included in the exception if the covered crime was committed against an insured depository institution or insured credit union. This requirement is contained in the general *de minimis* exception to filing, as well as the

exception pertaining to insufficient funds checks and the exception regarding those under 21. Therefore, the FDIC is making clear that the proposed small theft exception is treated similarly and is subject to the same restriction. As with any crime that does not fit a *de minimis* category, an application can still be filed.

Application Processing

Two of the comments raised a number of suggestions related to the processing of applications. One suggestion was to clarify the process for job applicants on the FDIC website. Similarly, two other comments also focused on the FDIC's website and application, suggesting that both should explain the process and relevant law in a plainer, more accessible language. Although these suggestions are beyond the language of the proposed changes to the SOP, the FDIC will update its website and application form and will develop a brochure that will provide guidance to the public on the application process.

Another suggestion was to require financial institutions to provide notice to job applicants if the institution will not file a waiver on the person's behalf, and to make the forms easily available to the applicant. Such a requirement is beyond the reach of the SOP insofar as it would require a formal rulemaking. A third suggested change was to shorten the period of time for the processing of an application by permitting the FDIC to verify documents in the applicant's possession. The FDIC already relies on the verification of documents provided by the applicant, but must also undertake an independent review to determine that the information is complete and accurate. A fourth suggestion was to include a link in the SOP to the application form. The FDIC agrees that this change is related to the SOP and has added a link in the final version.

Two comments relate to the evaluation of applications by the FDIC. Essentially these comments focused on instructions to application evaluators as to how to weigh and apply the factors set out in the SOP and as set out in the FDIC's regulations (12 C.F.R. 308.157). The suggestions were that the FDIC should provide instructions on how to evaluate the age of the applicant at the time of the conviction, the passage of time since the conviction, and the relevance of prior offenses. Although these are just some of the factors used by the FDIC to evaluate an application, the FDIC does not agree that further instruction to application reviewers is necessary or appropriate. The weight given to the various factors is often based on the totality of the circumstances and the factors are often interwoven in their application to a specific case. Each application undergoes review in the region by both experienced safety and soundness examiners and attorneys in the legal division, as well as several layers of management review, before a final determination is made. In the case of individuals seeking a waiver of the institution filings requirement, in addition to the review at the regional office, the application undergoes a similar review in the Washington Office. Further, such instruction would be one of internal policy and would not come within the purpose or intent of the SOP.

One comment suggested that the FDIC instruct individuals who are filing for themselves and requesting a waiver of the institution filing requirement to fill out the application form and include information identifying the position sought by the applicant. The FDIC does not agree that this would be appropriate for such applications which, if approved, result in blanket approval to participate in banking. One comment also suggested that the FDIC process applications in fewer than 60 days. While the FDIC

does work to process applications quickly, the establishment of such a timeline would be a matter of internal controls and does not fall within the purpose or intent of the SOP.

Technical and Clarifying Changes

In addition to the foregoing, the FDIC, upon review of the proposed SOP, has made the following technical and clarifying changes.

The FDIC has corrected an incorrect citation in Subsection A of the SOP that identifies the provisions of Section 19 that apply to bank and savings and loan holding companies. The correct citation is to 12 U.S.C. § 1829(d) and (e). Also, the FDIC believes that the example in Subsection A that describes Section 19 as not applying to employees of bank and savings and loan holding companies is misleading, and the FDIC has simplified the example to focus on the circumstances in which Section 19 may apply in the case of an insured depository institution. Therefore, that example has been adjusted to read “For example, in the context of the FDIC’s application of Section 19, it would apply to an insured depository institution’s holding company’s directors and officers to the extent that they have the power to define and direct the management or affairs of insured depository institution.”

The FDIC also made a slight change in Subsection D(1) to remove the word “covered” from the language in that subsection since it would appear to be conclusory, and its removal brings this factor in line with the language in the FDIC’s regulations (12 CFR 308.157(a)(1)).

Furthermore, the FDIC is adding language stating that Section 19 applications submitted by depository institutions are to be filed with the FDIC Regional Office covering the state in which the institution’s home office is located.

IV. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. These Modifications to the SOP for Section 19 of the FDI Act include clarification of reporting requirements in an existing FDIC information collection, entitled *Application Pursuant to Section 19 of the Federal Deposit Insurance Act* (3064-0018) that should result in a decrease in the number of applications filed. Specifically, the revised policy statement broadens the application of the *de minimis* exception to filing an application due to the minor nature of the offenses and the low risk that the covered party would pose to an insured institution based on the conviction or program entry. By modifying these provisions, the FDIC believes that there will be a reduction in the submission of applications where approval has been granted by virtue of the *de minimis* offenses exceptions to filing in the policy statement. In its last submission with OMB, the FDIC indicated that it will receive approximately 75 applications per year. The FDIC estimates that the revised SOP would reduce the number of applications filed each year by approximately 28 percent bringing the number of applications each year down to approximately 54. This change in burden will be submitted to OMB as a non-significant, nonmaterial change to an existing information collection. The estimated new burden for the information collection is as follows:

Title: “Application Pursuant to Section 19 of the Federal Deposit Insurance Act”.

Affected Public: Insured depository institutions and individuals.

OMB Number: 3064-0018.

Estimated Number of Respondents: 54.

Frequency of Response: On occasion.

Average Time per Response: 16 hours.

Estimated Annual Burden: 864 hours.

V. TEXT OF FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT.

For the reasons set forth above, the entire text of the proposed FDIC Statement of Policy for Section 19 is stated as follows:

FDIC STATEMENT OF POLICY FOR SECTION 19 OF THE FDI ACT

Section 19 of the Federal Deposit Insurance Act (12 U.S.C. § 1829) prohibits, without the prior written consent of the Federal Deposit Insurance Corporation (FDIC), a person convicted of any criminal offense involving dishonesty or breach of trust or money laundering (covered offenses), or who has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, owning or controlling, directly or indirectly an insured depository institution (insured institution), or otherwise participating, directly or indirectly, in the conduct of the affairs of the insured institution. In addition, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19. It imposes a ten-

year ban against the FDIC's consent for persons convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and court approval.

Section 19 imposes a duty upon an insured institution to make a reasonable inquiry regarding an applicant's history, which consists of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense.

The FDIC believes that at a minimum, each insured institution should establish a screening process that provides the insured institution with information concerning any convictions or program entry pertaining to a job applicant. This would include, for example, the completion of a written employment application that requires a listing of all convictions and program entries. In the alternative, for the purposes of Section 19, an FDIC-supervised institution may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution and to determine if the applicant is barred by Section 19. In such a case, the job applicant may not work for or be employed by the insured institution until such time that the applicant is determined to not be barred under Section 19. The FDIC will look to the circumstances of each situation for FDIC-supervised institutions to determine whether the inquiry is reasonable.

Section 19 applies, by operation of law, as a statutory bar to participation absent the written consent of the FDIC. Upon notice of a conviction or program entry, an application must be filed seeking the FDIC's consent prior to the person's participation. The purpose of an application is to provide the applicant an opportunity to demonstrate

that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an insured institution without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

A. Scope of Section 19.

Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. § 1813(u) and others who are participants in the conduct of the affairs of an insured institution. This Statement of Policy applies only to insured institutions, their institution-affiliated parties, and those participating in the affairs of an insured depository institution. Therefore, all employees of an insured institution fall within the scope of Section 19. In addition, those deemed to be *de facto* employees, as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to Section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. For example, in the context of the FDIC's application of Section 19, it would apply to an insured depository institution's holding company's directors and officers to the extent that they have the power to define and direct the management or affairs of insured depository institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they participate in the affairs of the insured institution or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the insured institution other than the activity

for which the insured institution has contracted. In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution would be covered by Section 19. Further, "person" for purposes of Section 19 means an individual, and does not include a corporation, firm or other business entity.

Individuals who file an application with the FDIC under the provisions of Section 19 who also seek to participate in the affairs of a bank or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. § 1829(d) & (e).

Section 19 specifically prohibits a person subject to its coverage from owning or controlling an insured institution. For purposes of defining "control" and "ownership" under Section 19, the FDIC has adopted the definition of "control" set forth in the Change in Bank Control Act (12 U.S.C. § 1817(j)(8)(B)). A person will be deemed to exercise "control" if that person has the power to vote 25 percent or more of the voting shares of an insured institution (or 10 percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the insured institution.

Under the same standards, person will be deemed to "own" an insured institution if that person owns 25 percent or more of the insured institution's voting stock, or 10 percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of Section 19 will be required to divest their control or ownership of shares above the foregoing limits.

B. Standards for Determining Whether an Application Is Required.

Except as indicated in paragraph (5), below, an application must be filed where there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction or conditions imposed by the pretrial diversion, or similar program, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning Section 19 can be accessed at the FDIC website. The link is:

<https://www.fdic.gov/regulations/laws/forms/section19.html>

(1) Convictions.

There must be present a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction that has been reversed on appeal. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application. A conviction that has been completely expunged is not considered a conviction of record and will not require an application. If an order of expungement has been issued in regard to a conviction or program entry and is intended by the language in the order itself, or in the legislative provisions under which the order was issued, to be a complete expungement, then the jurisdiction, either in the order or the underlying legislative provisions, cannot

allow the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. The failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of Section 19 in such a case. Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions. Convictions that are set aside or reversed after the applicant has completed sentencing will be treated consistent with pretrial diversions or similar programs unless the court records reflect that the underlying conviction was set aside based on a finding on the merits that such conviction was wrongful.

(2) Pretrial Diversion or Similar Program.

Program entry, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution often upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and, if not so designated under applicable law then the determination of whether it is a pretrial diversion or similar program will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by Section 19.

(3) Dishonesty or Breach of Trust.

The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. "Dishonesty" means directly or indirectly to cheat

or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which Federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless they fall within the provisions for *de minimis* offenses set out in (5) below.

(4) Youthful Offender Adjudgments.

An adjudgment by a court against a person as a "youthful offender" under any youth offender law, or any adjudgment as a "juvenile delinquent" by any court having jurisdiction over minors as defined by state law does not require an application. Such adjudications are not considered convictions for criminal offenses. Such adjudications do not constitute a matter covered under Section 19 and is not an offense or program entry for determining the applicability of the *de minimis* offenses exception to the filing of an application.

(5) *De minimis* Offenses.

(a) *In General.*

Approval is automatically granted and an application will not be required where the covered offense is considered *de minimis*, because it meets all of the following criteria:

- There is only one conviction or program entry of record for a covered offense;
- The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$2,500 or less, and the individual served three (3) days or less of jail time. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location.
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

(b) *Additional Applications of the De minimis Offenses Exception to Filing.*

Age at time of covered offense:

- If the actions that resulted in a covered conviction or program entry of record all occur when the individual was 21 years of age or younger, then the subsequent conviction or program entry, that otherwise meets the general *de minimis* criteria in (a) above, will be considered *de minimis* if the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required and all sentencing or program requirements have been met.

Convictions or program entries for insufficient funds checks:

- Convictions or program entries of record based on the writing of "bad" or insufficient funds check(s) shall be considered a *de minimis* offense under this provision and will not be considered as having involved an insured depository institution if the following applies:
- There is no other conviction or program entry subject to Section 19, and the aggregate total face value of all “bad” or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for bad or insufficient funds checks is \$1,000 or less; and
- No insured depository institution or insured credit union was a payee on any of the “bad” or insufficient funds checks that were the basis of the conviction(s) or program entry(ies).

Convictions or program entries for small-dollar, simple theft:

- A conviction or program entry based on a simple theft of goods, services and/or currency (or other monetary instrument) where the aggregate value of the

currency, goods and/or services taken was \$500 or less at the time of conviction or program entry, where the person has no other conviction or program entry under Section 19, where it has been five years since the conviction or program entry (30 months in the case of a person 21 or younger as described above) and which does not involve an insured financial institution or insured credit union is considered *de minimis*. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

Convictions or program entries for the use of a fake, false or altered identification card:

The use of a fake, false or altered identification card used by person under the legal age for the purpose of obtaining or purchasing alcohol, or used for the purpose of entering a premise where alcohol is served but for which age appropriate identification is required, provided that there is no other conviction or program entry for a covered offense, will be considered *de minimis*.

Any person who meets the criteria under (5) above shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate.

Further, no conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. § 1829(a)(2) can qualify under any of the *de minimis* exceptions to filing set out in 5 above.

C. Procedures.

When an application is required, forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured institution on behalf of a person (bank-sponsored) unless the FDIC grants a waiver of that requirement (individual waiver). Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. The appropriate Regional Office for a bank-sponsored application is the office covering the state where the bank's home office is located. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides.

D. Evaluation of Section 19 Applications.

The essential criteria in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the insured institution may constitute a threat to the safety and soundness of the insured institution or the interests of its depositors or threaten to impair public confidence in the insured institution. In determining the degree of risk, the FDIC will consider, in conjunction with the factors set out in 12 CFR 308.157:

- (1) Whether the conviction or program entry and the specific nature and circumstances of the offense are a criminal offense under Section 19;
- (2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured institution constitutes a threat to the safety and soundness of the insured institution or the interests of its depositors or threatens to impair public confidence in the insured institution;
- (3) Evidence of rehabilitation including the person's reputation since the conviction or program entry, the person's age at the time of conviction or program entry, and the time that has elapsed since the conviction or program entry;
- (4) The position to be held or the level of participation by the person at an insured institution;
- (5) The amount of influence and control the person will be able to exercise over the management or affairs of an insured institution;
- (6) The ability of management of the insured institution to supervise and control the person's activities;
- (7) The level of ownership the person will have of the insured institution;

(8) The applicability of the insured institution's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant including but not limited to the opinion or position of the primary Federal and/or state regulator.

The foregoing criteria will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban under 12 U.S.C. 1829(a)(2) for certain Federal offenses, prior to its expiration date.

Some applications can be approved without an extensive review because the person will not be in a position to constitute any substantial risk to the safety and soundness of the insured institution. Persons who will occupy clerical, maintenance, service, or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured institution. All approvals and orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all insured institutions in the affairs of which he or she wishes to participate. When deemed appropriate, bank sponsored applications are to allow the person to work

in a specific job at a specific bank and may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. In the case of bank applications such proposed changes may, in the discretion of the Regional Director, require a new application. In situations in which an approval has been granted for a person to participate in the affairs of a particular insured institution and who subsequently seeks to participate at another insured depository institution, another application must be submitted.

By order of the Board of Directors, July 19, 2018.

Dated at Washington, DC, on July 19, 2018.

By order of the Board of Directors.

Valerie Best,

Assistant Executive Secretary.

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